No. _____

IN THE
Supreme Court of the United States

KEMNORRIS KINSEY
Petitioner,

vs.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the administrative law principles set forth in *Kisor* v. *Wilkie*, 588 U.S. 558 (2019) limit the deference owed to the United States Sentencing Commission's commentary on the Sentencing Guidelines?

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PETITION FOR CERTIORARI

Petitioner Kemnorris Kinsey respectfully prays for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

On March 18, 2024, the judgment of the United States Court of Appeals for the Second Circuit was filed in a Summary Order. *See United States v. Wynn*, No. 22-2721-CR, 2024 WL 1152536, at *2–3 (2d Cir. Mar. 18, 2024). The decision is attached as Exhibit A.

On May 2, 2024, Mr. Kinsey filed a petition for rehearing and suggestion for rehearing *en banc*. The Second Circuit denied his petition on May 31, 2024. That order is attached as Appendix B.

JURISDICTION

On March 18, 2024, a three-judge panel for the Second Circuit issued a decision in Petitioner's appeal. Subsequently, on May 31, 2024, the Second Circuit denied Mr. Kinsey's petition for rehearing and suggestion for rehearing *en banc*.[1] This Court has jurisdiction to review the Second Circuit's decision pursuant to 28 U.S.C. § 1254.

RELEVANT GUIDELINES PROVISIONS

Section 4A1.2(a)(1) of the United States Sentencing Guidelines defines a prior sentence as "any sentence previously imposed upon adjudication of guilt, whether by

[1] The time to file a petition for a writ of *certiorari* runs from the date a timely petition for rehearing is denied. Sup. Ct. R. 13(3). A petition for a writ of *certiorari* is timely when filed within 90 days. Sup. Ct. R. 13(1). The petition for rehearing in this case was denied on May 31, 2024, making the petition for writ of *certiorari* due on August 29, 2024. A petition is timely filed if mailed on the date for filing. Sup. Ct. R. 29.2.

guilty plea, trial, or plea of nolo contendere, for conduct not part of the instant offense. U.S.S.G. § 4A1.2(a)(1).

Application Note 4 of § 2E1.1. provides:

> Certain conduct may be charged in the count of conviction as part of a "pattern of racketeering activity" even though the defendant has previously been sentenced for that conduct. Where such previously imposed sentence resulted from a conviction prior to the last overt act of the instant offense, treat as a prior sentence under § 4A1.2(a)(1) and not as part of the instant offense. This treatment is designed to produce a result consistent with the distinction between the instant offense and criminal history found throughout the guidelines. If this treatment produces an anomalous result in a particular case, a guideline departure may be warranted.

U.S.S.G. § 2E1.1, cmt. n.4. ("Application Note 4").

I.

STATEMENT OF THE CASE

By way of background, Mr. Kinsey pleaded guilty to one count of racketeering conspiracy, in violation of 18 U.S.C. §§ 1962(d) and 1963(a), pursuant to a plea agreement. Mr. Kinsey was initially sentenced to 150 months of imprisonment, to be followed by three years of supervised release. Mr. Kinsey twice appealed his sentence and, in both appeals, argued that Second Circuit precedent gave too much deference to Guidelines commentary after this Court's decision in *Kisor* v. *Wilkie*, 588 U.S. 558 (2019). In both of Kinsey's appeals, he argued that courts should not defer to commentary but instead must apply Guidelines provisions as plainly written per this Court's reasoning in *Kisor*. In *Kisor*, this Court articulated administrative law principles that circumscribe the deference courts must afford to agencies'

interpretations of their own legislative rules. *Id.* at 572–76.

In relevant part, during Mr. Kinsey's first appeal, he argued that the district court erred in calculating his offense level by assigning criminal history points for a 2015 New York state conviction for seventh-degree possession of crack cocaine ("2015 Conviction")—which occurred during the time frame of the charged racketeering conspiracy—when calculating his criminal history category ("CHC"), resulting in an increase from V to VI. This was error, Kinsey contended, because the 2015 Conviction should have been treated as relevant conduct to the charged racketeering conspiracy and not as part of his criminal history calculation. *Id*. at *1. Kinsey argued that Application Note 4 to § 2E1.1, the only guidelines vehicle in which Mr. Kinsey's conviction could have scored for criminal history points, was inapplicable and as non-interpretative commentary, it could not be used to increase a defendant's criminal history points per *Kisor*. After *Kisor*, Kinsey argued, when a court is faced with a discrepancy between the Guidelines and the commentary, it must first exhaust all the traditional tools of construction. Kinsey argued that *Kisor* overruled Second Circuit precedent which affords great deference to guidelines commentary to interpret a guidelines provision even if a guidelines provision is, in fact, plain on its face. In other words, the commentary in Application Note 4 could not be used to override § 4A.1.2(a)(1), which explicitly and unambiguously bars such an increase in criminal history points for someone in Mr. Kinsey's circumstances. *Id*.

In Kinsey's first appeal, however, the Second Circuit bypassed the issue presented by this Court's decision in *Kisor* and instead, concluded that the district

court did not plainly err in finding that the 2015 Conviction did not amount to relevant conduct. Nonetheless, the Second Circuit ordered a remand to the district court to address a different error related to calculating Mr. Kinsey's base offense level. *United States v. Hopper*, No. 19-3087-CR, 2022 WL 1566258, at *2 (2d Cir. May 17, 2022). On remand, the district court imposed a sentence of 136 months of imprisonment, to be followed by three years of supervised release. At the re-sentencing, however, Kinsey argued that his 2015 conviction should not score for criminal history points. The district court disagreed and again counted the 2015 conviction as it did at Mr. Kinsey's first sentencing.

As is relevant to this petition, Kinsey appealed his new sentence, arguing as he did in his first appeal, that the district court committed procedural error by miscalculating his criminal history category, relying on *Kisor*. On March 18, 2024, the Second Circuit issued a summary order affirming Mr. Kemnorris Kinsey's judgment. The Second Circuit decided not to reach the *Kisor* issue raised and decided, as it did in the first appeal, that Mr. Kinsey's 2015 conviction did not amount to relevant conduct. *United States v. Wynn*, No. 22-2721-CR, 2024 WL 1152536, at *2-3, n.6 (2d Cir. Mar. 18, 2024).

This Court should grant this petition because a robust Circuit split has developed around whether *Kisor's* reasoning applies to the Guidelines commentary. The Second Circuit has not explicitly examined *Kisor* in the context of sentencing guidelines but instead, has adhered to prior decisions relying on Guidelines commentary without discussing *Kisor*'s effect. *See United States v. Tabb*, 949 F.3d 81,

87 (2d Cir. 2020).

This Court should grant this petition to resolve the Circuit split and bring the Second Circuit in line with the Circuits that agree with Mr. Kinsey that *Kisor*'s limitations apply to Guidelines commentary. This is an important issue that impacts sentencings in criminal cases nationwide.

II.

ARGUMENT

A. This Court should grant this petition to resolve the Circuit split regarding *Kisor*'s impact on Guidelines commentary.

One of the principal purposes for which this Court uses its certiorari jurisdiction is to resolve conflicts among the Circuit courts of appeals concerning federal law. *See Braxton v. United States*, 500 U.S. 344, 347 (1991); Sup. Ct. R. 10(a). *Kisor*'s effect on *Stinson v. United States,* 508 U.S. 36 (1993), is an issue that has divided the circuits near evenly. *See United States v. Vargas*, 74 F.4th 673, 678 & nn. 2-3 (5th Cir. 2023) (*en banc*) (collecting cases).

This issue comes up frequently in criminal sentencings in various contexts. Often courts must wrestle with a plainly worded Sentencing Guidelines provision that is accompanied by contradictory Guidelines commentary. *See e.g., United States v. Banks*, 55 F.4th 246, 257 (3d Cir. 2022) ("The ordinary meaning of 'loss' in the context of § 2B1.1 is 'actual loss'" notwithstanding commentary which includes intended loss); *United States v. Kennert*, No. 22-1998, 2023 WL 4977456, at *4 (6th Cir. Aug. 3, 2023) (Murphy, J., concurring) (recognizing that "just because 'loss' can refer to [ ] different harms does not mean that it can refer to nonexistent ones too"),

with United States v. You, 74 F.4th 378, 397 (6th Cir. 2023) (applying *Kisor* framework to the Guidelines but concluding "loss" is ambiguous and including expansive definition contained in the commentary). *See also United States v. Campbell*, 22 F.4th 438, 444 (4th Cir. 2022) (noting that "if there were any doubt that under *Stinson* the plain text" of the guideline requires the conclusion that an attempt offense is not a "controlled substance offense," *Kisor* "renders this conclusion indisputable"); *United States v. Dupree*, 57 F.4th 1269, 1271, 1277 (11th Cir. 2023) (*en banc*) (holding that, "[w]ith *Kisor*'s refined deference scheme in mind," the "definition of 'controlled substance offense' in § 4B1.2(b) of the Sentencing Guidelines does not include inchoate offenses like conspiracy and attempt").

In short, the Circuit split is deep and entrenched. The issue is important because it impacts the sentencings of criminal defendants nationwide in a variety of contexts. Only this Court can provide a definitive answer and restore uniformity to the Circuits.

B. The Circuits that apply *Stinson's* more extreme form of deference to Guidelines commentary are wrong.

Roughly half of the Circuit Courts agree with Mr. Kinsey that *Kisor*'s limitations apply to Guidelines commentary. *See United States v. Nasir*, 17 F.4th 459, 471 (3d Cir. 2021) (*en banc*) (*Kisor* applies to Guidelines commentary); *United States v. Campbell*, 22 F.4th 438, 445 (4th Cir. 2022) (same); *United States v. Riccardi*, 989 F.3d 476, 484-85 (6th Cir. 2021) (same); *United States v. Castillo*, 69 F.4th 648, 655 (9th Cir. 2023) (same); *United States v. Dupree*, 57 F.4th 1269, 1275 (11th Cir. 2023) (*en banc*) (same).

Notwithstanding *Kisor*, six Courts of Appeals, including the Second Circuit, continue to apply *Stinson*'s more extreme form of deference to Guidelines commentary. *See United States v. Lewis*, 963 F.3d 16 (1st Cir. 2020) (*Kisor* does not apply to Guidelines commentary); *United States v. Tabb*, 949 F.3d 81 (2d Cir. 2020) (applying *Stinson* deference without discussing *Kisor*); *United States v. Moses*, 23 F.4th 347 (4th Cir. 2022) (cert. denied Jan. 9, 2023); *United States v. Vargas*, 74 F.4th 673, 678 (5th Cir. 2023) (*en banc*) (cert. denied Feb. 20, 2024); *United States v. Smith*, 989 F.3d 575 (7th Cir. 2021); *United States v. Maloid*, 71 F.4th 795 (10th Cir. 2023), (cert. denied March 4, 2024).

The Circuit Courts that disagree with Kinsey seemingly ignore that *Kisor* "reinforce[d] the limits" of *Bowles v. Seminole Rock*, 325 U.S. 410 (1945) and *Stinson*, and held that agencies may issue binding interpretations of their own regulations only when those regulations are "genuinely ambiguous." *Kisor,* 588 U.S. at 563. A court errs when it defers to an agency's construction of its regulations without first "exhaust[ing] all the 'traditional tools' of construction." *Id*.

While *Kisor* itself was not a case about the Guidelines, its reasoning applies here given the Sentencing Commission's similarity to other agencies interpreting their own rules. The Sentencing Commission, through the notice-and-comment process and congressional review,[2] issues its guidelines. Its commentary, however,

2 The Sentencing Commission must submit all proposed amendments to Congress, which has six months to review them before they take effect. 28 U.S.C. § 994(p). The Commission must also comply with the Administrative Procedure Act (APA), 5 U.S.C. § 553, by publishing notice of proposed amendments in the Federal Register and giving the public an opportunity to comment. 28 U.S.C. § 994(x).

does not go through such a process.

In Kinsey's case, § 4A1.2(a)(1) clearly circumscribes when a prior sentence is scorable for criminal history category determinations. It specifically excludes conduct which is part of the instant offense from its definition of a "prior sentence." Section 4A1.2 is plain: relevant conduct should not be scored as a prior sentence for the purpose of determining a defendant's criminal history category.

Contrary to § 4A1.2(a)(1), the commentary to §2E1.1 allows relevant conduct, charged in the count of conviction, to be used as a prior sentence to calculate criminal history even when the defendant has been previously sentenced for that relevant conduct. Application Note 4 of § 2E1.1. provides:

> Certain conduct may be *charged* in the count of conviction as part of a "pattern of racketeering activity" even though the defendant has previously been sentenced for that conduct. Where such previously imposed sentence resulted from a conviction prior to the last overt act of the instant offense, treat as a prior sentence under § 4A1.2(a)(1) and not as part of the instant offense. This treatment is designed to produce a result consistent with the distinction between the instant offense and criminal history found throughout the guidelines. If this treatment produces an anomalous result in a particular case, a guideline departure may be warranted.

U.S.S.G. § 2E1.1, cmt. n.4 (emphasis added) ("Note 4").

Note 4 conflicts with §4A1.2(a)(1)'s unambiguous definition of a prior sentence. Section 4A1.2 very clearly excludes conduct that is part of the instant offense from its definition of a prior sentence. Such offenses cannot be scored for criminal history points. Although Note 4 is located in Chapter Two, it cites § 4A1.2(a)(1) and expands its application to include relevant conduct in the form of prior convictions that are

charged in the instant offense. In other words, Note 4 is non-interpretative commentary that may increase a defendant's criminal history points based on relevant conduct—an action that the related Guidelines provision, § 4A.1.2(a)(1), explicitly bars.

When faced with a conflict between an unambiguous Guidelines provision and commentary, this Court should not defer to interpretative commentary. *Kisor*, 588 U.S. at 563. If a guideline and the commentary are inconsistent, "the Sentencing Reform Act itself commands compliance with the guideline." *Stinson*, 508 U.S. at 43 (citing 18 U.S.C. § 3553(a)(4), (b)). In any event, *Kisor* makes clear that when the text of a Guideline's provision is plain, courts may not defer to commentary for interpretation.

Under *Kisor*, a court may not defer to the Commission's interpretation of its own provision without first "exhaust[ing] all the 'traditional tools' of construction." *Kisor*, 588 U.S. at 575. Here, given §4A1.2(a)(1)'s plain textual meaning, Note 4 both directly conflicts with the §4A1.2(a)(1) and improperly expands its application to increase sentences for criminal defendants. If a guideline is unambiguous, "there is no plausible reason for deference" to the commentary, and the court must apply the guideline's unambiguous meaning. *Id.*

The courts that apply more deference to guidelines commentary, notwithstanding *Kisor*, rely on this Court's decision in *Stinson*. In *Stinson*, this Court held that the United States Sentencing Commission's commentary on the Sentencing Guidelines should be treated like "an agency's interpretation of its own legislative

rules." *Id.* at 45. At the time, that meant the commentary had to be afforded "'controlling weight unless it [was] plainly erroneous or inconsistent with'" the Guidelines themselves. *Id.* (quoting *Bowles v.*, 325 U.S. at 414.

But that changed after *Kisor*. After *Kisor* was published, the courts should have recognized that its previous precedent had taken *Stinson* deference too far. As recognized by the Third Circuit, *Kisor* "cut back on what had been understood to be uncritical and broad deference to agency interpretations of regulations and explained that *Auer*, or *Seminole Rock*, deference should only be applied when a regulation is genuinely ambiguous." *Nasir,* 17 F.4th at 471. Applying *Kisor*'s refined deference standard, the *Nasir* court held that "a plain-text reading of [§] 4B1.2(b)" indicates that it does not include inchoate crimes. *Id.*; *see also Riccardi*, 989 F.3d at 485 (recognizing that broad deference to Guidelines' commentary "could not stand after *Kisor*," and that *Kisor* "must awake us 'from our slumber of reflexive deference' to the commentary" (citation omitted)).

This Court should grant this petition and make clear that *Kisor* does not permit "the continued mechanical application of [*Stinson*'s substantive deference standard]..." *Dupree*, 57 F.4th at 1275. *See also, e.g.*, *Castillo*, 69 F.4th at 656. "Congress has delegated substantial responsibility to the Sentencing Commission, but as the Supreme Court emphasized in *Kisor*, the interpretation of regulations ultimately 'remains in the hands of the courts.'" *Nasir*, 17 F.4th at 472 (internal citation omitted).

III.

CONCLUSION

For the foregoing reasons, the petitioner prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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